



ENVIRONMENT IN THE COURTROOM

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Creative Sentencing: The Experience “Down-Under”

SHARON MASCHER

Introduction

In Australia, the question of how best to sentence an offender convicted of an environmental crime remains a challenge. Commenting on criminal sentencing more generally, Judge Goldring of the New South Wales (NSW) District Court wrote that “sentencing is the most difficult task that faces any judicial officer in the criminal justice process.”¹ Reflecting on this comment in the context of sentencing of environmental offences, Justice Pepper of the New South Wales Land and Environment Court remarked, “Indeed, the time I have spent on the bench [...] has done little to convince me otherwise.”²

The traditional sanction for environmental crimes in Australia is by way of fine. Yet this approach to environmental sentencing continues to be “variously criticised for imposing mainly fines, for imposing fines too light to deter, for imposing penalties not tailored to the offender or the offence and for not reflecting the moral repugnance of the crime.”³ As in other jurisdictions, these criticisms have been met by many Australian legislatures by both increasing maximum monetary penalties and expanding the range of sentencing tools available to the courts.

This chapter looks at the availability of, and practice around, creative sentencing orders relating to environmental offences in Australia, drawing particularly on the sentencing practice in NSW.

The Prosecution of Environmental Offences

As in Canada, not all alleged environmental offences are prosecuted, with regulators often reserving prosecution for the most serious of breaches.⁴

This approach is reflected in the NSW Environmental Protection Authority (EPA) Prosecution Guidelines, which state that even when there is sufficient evidence, “(a) ... the laying of charges is discretionary, and (b) the dominant factor in the exercise of that discretion is the public interest.”⁵ The Guidelines also recognize that prosecution may not always be the appropriate response. In keeping with this, the *Protection of the Environment Operations Act 1997* (the *POEO Act*) provides a variety of non-prosecution options.⁶ Prosecution, therefore, is used “as part of the EPA’s overall strategy for achieving its objectives [...] as a strategic response where it is in the public interest to do so.”⁷

The Sentencing of Environmental Offences

SENTENCING PURPOSES

When an environmental offence is prosecuted, there are seven overlapping purposes the court must consider in determining an appropriate sentence: punishment; deterrence; community protection; rehabilitation of the offender; making the offender accountable; denunciation; and recognizing the harm inflicted on the victim and the wider community.⁸ While all are relevant, in environmental sentencing the utilitarian purpose of achieving deterrence is of particular importance. This is made explicit in the NSW EPA Prosecution Guidelines, which state that “[i]n criminalising breaches of environmental laws a primary, though not the sole, aim of Parliament is deterrence.”⁹

SENTENCING CONSIDERATIONS

However, courts are required to consider a range of factors in coming to a sentencing decision, to ensure that the sentence reflects both the objective seriousness of the offence and the subjective circumstances of the defendant.¹⁰

In NSW, section 241(1) of the *POEO Act* requires the court to consider the following five factors when imposing a penalty:

- the extent of environmental harm caused or likely to be caused;
- the practical measures taken to prevent, control, abate, or mitigate the harm;
- the reasonable foreseeability of the harm by the person who committed the offence;
- the extent to which the person who committed the offence had control over the causes that resulted in the offence;
- whether in committing the offence, the person was complying with orders from an employer or supervisor.

The court may also take into consideration any other matters it considers relevant,¹¹ including:¹²

- evenhandedness;
- the principle of totality;
- the principle of proportionality;
- early entry of a plea of guilty;
- lack of prior convictions;
- genuine contrition;
- cooperation with the investigation;
- remedial measures undertaken;
- whether a repeat offence is likely;
- any agreement voluntarily undertaken between the defendant and the regulator for environmental benefit.

CUSTODIAL SENTENCES AND FINES

Operating as both “the upper limit on the sentencing judge’s discretion”¹³ and an expression of the legislative view on the “seriousness of criminal conduct,”¹⁴ the maximum penalties available for an offence play a significant role in determining the objective severity of the offence in the sentencing process.¹⁵ In Australia, the maximum penalties for environmental offences have been increased significantly in recent years. In the *POEO Act*, Tier 1 offences (intentional offences) committed wilfully now carry maximum penalties of \$5 million for corporations and \$1 million and/or seven years’ imprisonment for individuals, while Tier 1 offences committed negligently carry a maximum penalty of \$2 million for corporations and \$500,000 and/or four years’ imprisonment for individuals.¹⁶ Strict liability offences carry maximum penalties of \$1 million for corporations and \$250,000 for individuals, with further daily maximum penalties of \$120,000 and \$60,000 respectively.¹⁷ And an individual who is convicted of polluting water or land or unlawfully transporting or disposing of waste (“the waste offences”) who within five years of that conviction commits a separate subsequent waste offence faces the maximum individual strict liability fine and up to two years’ imprisonment.¹⁸

In Australia, the availability of the increasingly higher maximum penalties for environmental offences is explained on the basis of a desire to achieve greater deterrence. So, for example, when the maximum penalties in the *POEO Act* were increased in 2005, the second reading speech introducing the amendment Act emphasized the need to maintain the “original deterrent value” of

the penalties.¹⁹ As Lloyd J. of the NSW Land and Environment Court stated in *Director-General of the Department of Environment and Climate Change v. Taylor*:²⁰

... persons will not be deterred from committing environmental offences by nominal fines. There is a need to uphold the integrity of the planning system of protecting and preserving endangered ecological communities. There is a need to send a strong warning to others who might be minded to breach the law that such actions will be visited upon with significant consequences.

In *Bentley v. BGP Properties*,²¹ the NSW Land and Environment Court also emphasized that the penalty not only needs to be designed to deter the offender but “must also serve the purpose of general or public deterrence”²² to others who might otherwise be tempted to commit similar crimes. This is a factor of particular relevance in the context of environmental offences.²³

However, the courts have also recognized that the concept of proportionality, together with other subjective sentencing considerations, may operate to constrain the purposes of achieving deterrence through sentencing.²⁴ Justice Bignold captured this sentiment in *Director-General of the Department of Land and Water Conservation v. Robson*, stating: “I am mindful of [...] the need for general deterrence and of the need to apply sentencing policy not unfairly (or out of proportion to the gravity of the offence in penalising the Defendant) but in furtherance of the public educative role of the criminal law.”²⁵

Other sentencing considerations such as evenhandedness, which requires the court to have regard to the general sentencing patterns in judicially relevant cases, may also have the effect of reducing penalties in a way that correspondingly impacts the message of deterrence.²⁶

While perhaps the ultimate deterrent, custodial sentences for environmental crimes are rare in Australia and generally reserved for the most egregious of cases.²⁷ The much more common sentencing option in Australia is the imposition of a fine.²⁸ While trends suggest that the fines imposed for environmental crimes in Australia are increasing,²⁹ in NSW³⁰ and throughout Australia more generally,³¹ the fines imposed are often only a fraction of the maximum fine available.

Regardless of the level of fine imposed, monetary penalties are not always the best means to achieve deterrence or, where warranted, retribution.³² In particular, there is concern that some defendants, and particularly corporate defendants, have the financial ability to absorb fines as a “cost of

business”³³—with the result that a fine is unlikely to serve as a deterrent to either the individual corporate offender or to corporations more generally.³⁴ This is particularly so where a corporate offender stands to profit from the commission of an offence, a particular concern in Australia in relation to native vegetation clearing offences and the “waste offences” referred to above.³⁵ At the other end of the spectrum, the court is also unlikely to impose significant fines on individuals who do not have the capacity to pay,³⁶ in which case the nominal fine again offers no real deterrent.

In Australia, therefore, the rationale for providing courts with alternative, creative sentencing options is largely referenced in answer to the question—how can the sentencing of environmental crimes “provide a more socially acceptable outcome?”³⁷ Creative sentencing options allow the courts to “deal with situations where a fine/custodial sentence is considered either an inappropriate or an insufficient sentence.”³⁸

CREATIVE SENTENCING OPTIONS

While many Australian legislatures have now introduced a range of creative sentencing options into their environmental legislation, creative sentencing orders are used most commonly in the Australian states of Victoria and NSW.³⁹ In the case of NSW, this is perhaps partially explained by the fact that the specialist Land and Environment Court has jurisdiction to sentence environmental offenders under the *POEO Act* and other state environmental legislation.

Under the *POEO Act*, the court may order an offender to do one or more of the following:

- take specified actions to publicize the offence, its environmental and other consequences, and any other orders made against the defendant to either a specified class of persons (including for example shareholders) or generally;⁴⁰
- carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit,⁴¹ and if the EPA is a party to the proceedings, provide financial assurances to the EPA, of a form and amount specified by the court, for that court-ordered program;⁴²
- carry out any social or community activity for the benefit of the community or persons that are adversely affected by the offence (a “restorative justice activity”) that the offender has agreed to carry out;⁴³

- undertake specified environmental audits of activities carried on by the offender;⁴⁴
- pay a specified amount into the New South Wales Environmental Trust or to a specified organization, for the purposes of a specified project for the restoration or enhancement of the environment or for general environmental purposes;⁴⁵
- attend specified training or courses or design specified courses for employees or contractors;⁴⁶
- take steps to prevent, restore, and abate any harm to the environment caused by the commission of the offence, to repair any resulting environmental damage, and to prevent the continuance or recurrence of the offence;⁴⁷
- compensate a public authority or any other person for expenses incurred or damages suffered as the result of the offence;⁴⁸
- pay costs and expenses associated with the investigation of the offence;⁴⁹ and
- repay the monetary benefit derived from the offence.⁵⁰

Any such order may be made in addition to, or in lieu of, any monetary penalty or custodial sentence that might otherwise be imposed, and one or more orders may be made against the offender.⁵¹ Importantly, the amount of any such additional penalty is not subject to any maximum amount of penalty provided elsewhere by or under the Act.⁵² As an alternative to imprisonment of an individual, a community service order is also available to the court in appropriate situations.⁵³

NSW EPA GUIDELINES FOR SEEKING ENVIRONMENTAL COURT ORDERS

The NSW EPA Guidelines for Seeking Environmental Court Orders⁵⁴ divide these sentencing options into two groups: orders aimed at restoring or preventing the recurrence of the offence; and orders aimed at punishing or deterring offenders.

Orders Aimed at Restoring or Preventing the Recurrence of the Offence

The Guidelines place cleanup orders, compensation orders, investigation costs orders, monetary benefit penalty orders, and environmental orders (meaning orders to restore or prevent harm to the environment) in the first group. The collective purpose of these kinds of orders is “to attempt to return the

environment, and those committing/affected by the offence, to the same position it/they were in prior to the offence and also ensure that the offender takes steps to guard against future contraventions.”⁵⁵

In accordance with the Guidelines, orders for cleanup or compensation will ordinarily be sought, unless the EPA determines that the defendant does not have sufficient funds. In keeping with the principle that an offender should not profit from committing an offence, monetary benefit orders together with investigation costs orders will generally also be sought. Environmental audit orders, on the other hand, are sought when the offender’s operations “lack essential environment protection systems” or “there are serious ongoing failures in those systems.”⁵⁶ Again, the Guidelines make it clear that this type of order is not intended to punish but rather to ensure that the offender takes steps to undertake its activities in a manner that is environmentally acceptable.

Orders Aimed at Punishing or Deterring Offenders

Together with fines and custodial sentences, publication orders and environmental service orders are classified as orders aimed at punishing or deterring offenders.

The NSW Land and Environment Court has recognized that publication of both the prosecution and the punishment of environmental offenders improves the effectiveness of general deterrence by bringing broader attention to the consequences of such conduct.⁵⁷ However, publication orders are largely used as a response to the criticism that fines alone may be an inadequate deterrent for large corporations. As such, according to the Guidelines, this type of order is mainly reserved for “corporate offenders as it is likely to be of the most deterrent value to them.”⁵⁸ In determining whether a publication order is appropriate, the EPA is also directed to consider the defendant’s culpability and environmental record as well as the threatened or actual environmental harms caused by the incident. After the fact, cooperation or contribution, however, are not relevant factors to consider in determining whether a publication order is appropriate. It is ordinarily the case that the order will specify that the notice be published, at a minimum, in a newspaper circulating state-wide and, in the case of public companies, in the executive summary of the company’s annual report.⁵⁹

An environmental service order allows the court to order that a specified project be carried out for the restoration or enhancement of the environment in a public place or for the public benefit. While the result is to deliver a benefit to the public, the Guidelines make clear that such an order is made for

the purposes of punishment or deterrence. As such, a publication order will always be sought in conjunction with an environmental service order so that it is understood the project is being carried out because of the commission of the offence, rather than, for example, because the offender “simply being a good citizen.”⁶⁰ Such an order will only be sought from the court when an appropriate project can be found in the vicinity of the offence, and then only if the offender has the ability, means, and willingness to carry out the project. Only projects with easily measured outcomes will be considered suitable.⁶¹

CREATIVE SENTENCING IN PRACTICE IN NSW

The recent sentencing decision in *Environment Protection Authority v Clarence Colliery Pty Ltd; Office of Environment and Heritage v Clarence Colliery*⁶² provides a good example of the use of creative sentencing in NSW. The sentencing decision relates to an incident that resulted in coal fines slurry flowing from the defendant’s coal mines into an unnamed watercourse and eventually into the Blue Mountains National Park and the Wollangambe River. With approximately 10.3 kilometres of the river affected by the slurry, Clarence Colliery was charged with, and pleaded guilty to, two environmental offences. The first offence, under section 166(1)(a) of the *POEO Act*, was negligently causing a substance to leak, spill, or otherwise escape in a manner that harms or is likely to harm the environment. The second, under section 156A(1)(b) of the *National Parks and Wildlife Act 1974 (NSW)*, related to damaging land reserved under that Act. After considering the relevant sentencing principles, and taking into account the objective and subjective circumstances, Robson J. imposed a total fine for both offences of \$1,050,000.⁶³ As agreed by the prosecutor and Clarence Colliery, the court held that this monetary penalty be paid to the Environmental Trust established under the *Environmental Trust Act 1995 (NSW)* pursuant to sections 250(1)(e) of the *POEO Act* and 205(1)(d) of the *National Parks and Wildlife Act* in order to fund the following five specific projects for restoration or enhancement of the environment:

1. “stabilisation of walking tracks in the Newnes Plateau and Wollangambe/Mt Wilson area”;
2. “enhancing the survival of the endangered Blue Mountains Water Skink”;
3. enhancement of “Farmers Creek Master Plan”;
4. Office of Environment and Heritage “water quality and improvement”; and

5. Office of Environment and Heritage “Weed control in Wollangambe Catch.”

Significantly, Robson J. was provided with documentation, including detailed descriptions in relation to each of the proposed projects, and was satisfied that each of the projects was designed to meet the principal objective of “reducing the impacts on the water quality of the Wollangambe Catchment in Blue Mountains and Wollemi National Parks by targeted erosion control, weed control and rehabilitation of areas disturbed by illegal use, and improving sanitation facilities at a popular camp area.”⁶⁴ These projects, in turn, were considered by Robson J. “to be appropriate in the circumstances where Clarence Colliery’s commission of the offences has caused harm to the areas generally the subject of the proposed projects.”⁶⁵

In addition, Robson J. made two important publication orders. First, all future public references by the defendant, Clarence Colliery, to the payments specified in the order to carry out the specified restoration or enhancement projects were to be accompanied by the following passage:⁶⁶

Clarence Colliery Pty Ltd’s contribution to the funding of the “[insert name of project]” is part of a penalty imposed on it by the Land and Environment Court of NSW after it was convicted of an offence against the *Protection of the Environment Operations Act 1997* (NSW).

Second, Clarence Colliery was ordered to place a notice detailing the offence and penalty in three newspapers (the *Australian Financial Review*, the *Sydney Morning Herald*, and the *Lithgow Mercury*). The order specified the wording of the notice, the minimum size of the notice, and where (how far from the first page) the notice must appear in each newspaper.⁶⁷

Finally, Robson J. also ordered that Clarence Colliery pay investigation costs totalling \$106,010 as well as legal costs.⁶⁸ As the defendant had already itself undertaken a large-scale cleanup, it also bore these costs, although they did not form part of the order.

Next Steps in Creative Sentencing for Environmental Offences Taking a Restorative Justice Approach

As noted above, the NSW *POEO Act* allows the court to order an offender “to carry out social or community activity for the benefit of the community or persons that are adversely affected by the offence (a ‘restorative justice

activity’) that the offender has agreed to carry out.”⁶⁹ This provision, inserted by amendment in 2015,⁷⁰ is “sufficiently broad” to allow the court to order restorative justice processes, such as conferences,⁷¹ and restorative justice outcomes in the context of environmental sentencing.⁷²

As the Chief Justice Brian Preston of the NSW Land and Environment Court has written, “[r]estorative justice has the potential to be transformative for the offender, the victims, the community, the environment and the justice system.”⁷³ This transformation is possible because “the community, victims⁷⁴ and the offender participate together actively in resolving matters arising from the offender’s crime, remedying harm caused to the environment and other victims and preventing re-offending, thereby protecting the environment in the future.”⁷⁵ However, this transformation is not without its challenges. As members of the NSW Land and Environment Court have noted, the main challenge in implementing restorative justice in the sentencing of environmental offences is “responding to the tension between traditional sentencing options and restorative justice outcomes, the latter of which seeks to resolve harm collectively rather than focus on punishment and retribution.”⁷⁶ While not necessarily making the sentencing purposes identified at the outset unachievable, “[r]estorative justice may alter the usual weighting of these principles.”⁷⁷ Ultimately, however, the use of restorative processes may allow a more holistic approach to environmental crime, with the potential to transform relationships and behaviours and provide a means to empower and give a voice to the broader community and the environment as victims of environmental crime.⁷⁸ In this way, the restorative justice approach now available in NSW should offer something that environmental sentencing, even creative sentencing, to date has not.

NOTES

- 1 The Hon Judge J Goldring, NSW Land and Environment Court, “Facts and Statistics in the Sentencing Process” (2009) 32 *Austl Bar Rev* 281 at 282 and 286.
- 2 The Hon Justice R Pepper, NSW Land and Environment Court, “Recent Developments in Sentencing of Environmental Offences” (Paper delivered at the Australasian Conference of Planning and Environment Courts and Tribunals, Perth, 28 August–2 September 2012) at 1 [Pepper].
- 3 *Ibid.*
- 4 S Bricknell, *Environmental Crime in Australia*, Research and Public Policy Series 109 (Canberra: Australian Institute of Criminology, 2010) at xii; Pepper, *ibid* at 8.
- 5 NSW Environment Protection Authority, *EPA Prosecution Guidelines* (Sydney, NSW: Dept of Environment and

- Conservation, 2013) at 3 [EPA Prosecution Guidelines]. The *EPA Prosecution Guidelines* list several factors that may be considered alone or in conjunction to determine whether the public interest requires prosecution
- 6 *Protection of the Environment Operations Act [POEO Act]*, Act 156 of 1997, online: <http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_act/poteoa1997455/>. Jurisdictions throughout Australia commonly use administrative tools such as enforceable undertakings, penalty notices, or civil penalty regimes as an alternative to criminal prosecution. For a discussion of guidelines relating to the use of enforceable undertakings in NSW, see NSW Environment Protection Authority, *Guidelines on Enforceable Undertakings* (Sydney, NSW: Dept of Environment and Conservation, 2017), online: <<http://www.epa.nsw.gov.au/licensing-and-regulation/legislation-and-compliance/policies-and-guidelines>>.
 - 7 EPA Prosecution Guidelines, *supra* note 5 at para 2.2.7.
 - 8 *Crimes (Sentencing Procedure) Act*, 1999 (NSW), s 3A. The High Court of Australia has stated: “The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.” (*Veen v R (No 2)*, [1988] HCA 14. 164 CLR 465 at 476.) For a full discussion of these sentencing purposes in the context of environmental crime, see Hon Chief Justice B Preston, NSW Land and Environment Court, “Principles Sentencing for Environmental Offences” (Paper presented at the 4th International IUCN Academy of Environmental Law Colloquium, *Compliance and Enforcement: Toward More Effective Implementation of Environmental Law*, Pace University School of Law, 16–20 October 2006) at 1–12 [Preston].
 - 9 EPA Prosecution Guidelines, *supra* note 5 at 2.2.5. See also Preston, *ibid* at 40.
 - 10 *Veen v R (No 1)* (1979), 143 CLR 458 at 490; *Veen v R (No 2)* (1988), 164 CLR 465 at 472; *R v Scott*, [2005] NSWCAA 152 at para 15. For a full discussion of these sentencing considerations, see: Preston, *supra* note 8 at 12–29.
 - 11 *POEO Act*, s 241(2). To increase predictability, consistency, accessibility, and transparency in sentencing for environmental offences, sentencing statistics for criminal matters dealt with by the NSW Land and Environment Court are accessible in graphical form on the Judicial Information Research System, online: <<https://www.judcom.nsw.gov.au/judicial-information-research-system-jirs/>>. For a discussion of this database, see Hon Chief Justice B Preston and H Donnelly, “The Establishment of an Environmental Crime Sentencing Database in New South Wales” (2008) 32 *Criminal Law Journal* 214.
 - 12 New South Wales Environmental Defender’s Office, “Court Imposed Fines and their Enforcement” (Submission to the NSW Sentencing Council, 8 June 2006), referencing G Bates, *Environmental Law in Australia* (Australia: Butterworths, 2002) at 226–227.
 - 13 Pepper, *supra* note 2 at 3.
 - 14 Preston, *supra* note 8 at 33. See also *Chief Executive of the Office of Environment and Heritage v Grant Wesley Turnbull*, [2017] NSWLEC 141 at para 24; *Bankstown City Council v Hanna*, [2014] NSWLEC 152 at para 58.
 - 15 Pepper, *supra* note 2 at 3.
 - 16 *POEO Act*, s 119.
 - 17 See, e.g., *POEO Act*, s 123.
 - 18 *POEO Act*, s 144AB. This amendment was introduced by the *Protection of the Environment Operations (Illegal Waste Disposal) Act*, 2013. See P Crofts, “Communicating the Culpability of

- Illegal Dumping: *Banstown v Hanna* (2014) (2015) 2 AELJ 57 [Crofts] for a discussion of facts resulting in this amendment.
- 19 Mr Bob Debus, Attorney General, Minister for the Environment, HANSARD, 2nd Reading Speech, 28 November 2005.
 - 20 [2007] NSWLEC 530 at para 32.
 - 21 [2006] NSWLEC 34 (6 February 2006) at para 139.
 - 22 *Bentley, ibid.*
 - 23 *Bentley, ibid.* See, e.g., *Chief Executive of the Office of Environment and Heritage v Cory Ian Turnbull*, [2017] NSWLEC 140 at paras 231–232 for a discussion of specific and general deterrence in the context of a recent decision.
 - 24 R Bartel, “Sentencing for Environmental Offences: An Australian Exploration (Presented at the Sentencing Conference, National Judicial College of Australia, ANU College of Law, February 2008) at 4; and Preston, *supra* note 8.
 - 25 *Director-General of the Department of Land and Water Conservation v MW Robson*, [1998] NSWLEC 174 at para 20.
 - 26 See G Bates, *Environmental Law in Australia*, 7th ed (Australia: LexisNexis Butterworths, 2010) at para 16.83 for a discussion of the application of evenhandedness in the context of environmental sentencing.
 - 27 See, e.g., *Wood v Ivanyi*, [2016] SAERDC 3; *Environment Protection Authority v Hanna*, [2013] NSWLEC 41; *Environmental Protection Authority v Janna*, [2013] NSWLEC 41; *Environmental Protection Authority v Gardner*, [1997] NSWLEC 169; *R v Moore*, [2003] 1 Qld Reports 205; and *R v Dempsey*, [2002] QCA 4.
 - 28 C Abbot, “The Regulatory Enforcement of Pollution Control Laws: The Australian Experience” (2005) 17 J Envnt L 161 at 170.
 - 29 Pepper, *supra* note 2 at 2. See also D Cole, “Creative Sentencing – Using the Sentencing Provisions of the South Australian Environment Protection Act to Greater Community Benefit” (2008) 25 EPLJ 94 at 95 [Cole]. It is difficult to identify a statistical trend because individual penalties are heavily dependent on the objective and subjective considerations that inform the sentencing decision. The NSW Land and Environment Court has created a sentencing database in an attempt to provide judges, legislatures, and members of the public easier access to more nuanced information relating to environmental sentencing: Hon Chief Justice B Preston, NSW Land and Environment Court, “A Judge’s Perspective on Using Sentencing Databases” (Presented at the Judicial Reasoning: Art or Science Conference, Australian National University, Canberra, 7–8 February 2009).
 - 30 Crofts, *supra* note 18 at 74, referring to M Hain and C Cocklin, “The Effectiveness of the Courts in Achieving the Goals of Environmental Protection Legislation” (2001) 18:3 Environment and Planning and Law Journal 319–338; and P Crofts and J Prior, *Environment Protection Authority Responses to Illegal Dumping in NSW: An Analysis of Clean-Up Notices and Prosecutions*, Report submitted to the NSW EPA (University of Technology, Sydney, 2014).
 - 31 Bricknell, *supra* note 4 at xii. Bricknell suggests that these low fines may be explained, in part, by the role of magistrates’ courts in environmental sentencing as, unlike the specialist environment courts of NSW and South Australia, magistrates’ courts see environmental crimes only intermittently and lack judicial training in dealing with environmental matters.
 - 32 Bricknell, *ibid.*
 - 33 Pepper, *supra* note 2 at 4–5. See also Cole, *supra* note 29 at 96.
 - 34 Pepper, *ibid* at 6; Cole, *ibid*; and Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC Report No 68 (Sydney: Commonwealth of Australia, 1994) at para 10.3. See also NSW EPA, “Guidelines for Seeking Environmental Court

- Orders” [NSW EPA “Guidelines”], online: <<http://www.epa.nsw.gov.au/licensing-and-regulation/legislation-and-compliance/policies-and-guidelines/guidelines-seeking-enviro-court-orders>>. The Guidelines state: “It is certainly arguable that even the maximum fine available for a Tier 2 offence provides no real deterrent to a major corporation.”
- 35 The media release announcing the increased penalties and creative sentencing options for waste offences states: “The current penalties do not outweigh the profits from illegal activity, and as long as that remains, unscrupulous waste operators will continue to exploit the system.” Environment Minister Robyn Parker, Media Release, “NSW Government to Crack Down on Illegal Dumping (29 May 2013), online: <<http://www.environment.nsw.gov.au/resources/MinMedia/MinMedia13052901.pdf>>.
- 36 NSW EPA “Guidelines,” *supra* note 34.
- 37 Cole, *supra* note 29 at 96.
- 38 NSW EPA “Guidelines,” *supra* note 34.
- 39 Pepper, *supra* note 2 at 6–7.
- 40 *POEO Act*, s 250(1)(a)–(b). See, e.g., *Bankstown City Council v Hanna*, [2014] NSWLEC 152; *Environment Protection Authority v Queanbeyan City Council (No 3)*, [2012] NSWLEC 220.
- 41 *POEO Act*, s 250(1)(c). See, e.g., *Environmental Protection Authority v Yolarno Pty Ltd*, [2004] NSWLEC 264 at para 25.
- 42 *POEO Act*, s 250(1)(h).
- 43 *POEO Act*, s 250(1A).
- 44 *POEO Act*, s 250(1)(d). See, e.g., *Environmental Protection Authority v Ramsay Food Processing Ltd (No 2)*, [2010] NSWLEC 150.
- 45 *POEO Act*, s 250(1)(e). See, e.g., *Environmental Protection Authority v Caltex Refineries (NSW) Pty Ltd*, [2006] NSWLEC 335.
- 46 *POEO Act*, s 250(1)(f)–(g).
- 47 *POEO Act*, s 245. See, e.g., *Environmental Protection Authority v Warringah Golf Club (No 2)*, [2003] NSWLEC 140.
- 48 *POEO Act*, ss 246 and 247. See, e.g., *Environmental Protection Authority v Obaid*, [2005] NSWLEC 171.
- 49 *POEO Act*, s 248(1). See, e.g., *Environmental Protection Authority v Centennial Newstan Pty Ltd*, [2010] NSWLEC 211.
- 50 *POEO Act*, s 249(1).
- 51 *POEO Act*, s 244(1).
- 52 *POEO Act*, s 244(2).
- 53 *Crimes (Sentencing Procedure) Act (NSW)*, Act 92 of 1999 at ss 8(1) and 86. The legislation prescribes 500 hours as the maximum number of community service hours: s 8(2). See, e.g., *Environmental Protection Authority v Coggins*, [2003] NSWLEC 111.
- 54 NSW EPA “Guidelines,” *supra* note 34.
- 55 *Ibid*.
- 56 *Ibid*.
- 57 See *Environment Protection Authority v Waste Recycling and Processing Corporation*, [2006] NSWLEC 419 at para 242; *Environmental Protection Authority v Dyno Nobel Asia Pacific Pty Ltd*, [2017] NSWLEC 64 at para 163.
- 58 *Ibid*.
- 59 *Ibid*.
- 60 *Ibid*. See also Preston, *supra* note 8 at 38.
- 61 *Ibid*.
- 62 [2017] NSWLEC 82.
- 63 Robson J found the appropriate monetary penalties to be \$1,200,000.00 for the *POEO Act* offence and \$550,000 for the *National Parks and Wildlife Act* offence. These amounts were then reduced by 25% for the utilitarian value of the early pleas of guilty. The application of the totality principle resulted in the combined fines being adjusted by a further 20%, resulting in a total fine of \$1,050,000 (at paras 135–136).
- 64 *Supra* note 62 at para 139.
- 65 *Ibid*.
- 66 *Ibid* at para 145.
- 67 *Ibid* at para 145 and Annexure A.
- 68 *Ibid* at para 145.
- 69 *POEO Act*, s 250(1A). The proviso that offenders must agree to carry out a restorative justice activity is in keeping with

- need for offenders to accept responsibility for their criminal behaviour and for their participation not to be coerced in a restorative justice process. See United Nations Office on Drugs and Crime (UNODC), *Handbook on Restorative Justice Programs* (United Nations, New York, 2006) at 11; Hon Justice B Preston, “The Use of Restorative Justice for Environmental Crime” (2011) 35 *Criminal Law Journal* 136, online: SSRN <<https://ssrn.com/abstract=1831822>> at 13 [Preston].
- 70 *Protection of the Environment Legislation Amendment Act*, 2014 No 65. This Act also amended the *Contaminated Land Management Act 1997* (NSW) and the *Radiation Control Act 1990* (NSW) to include restorative justice activities. Several years prior to this amendment, restorative justice processes were used by Hon B Preston CJ of the NSW Land and Environment Court in *Garrett v Williams*, [2007] NSWLEC 96, 151 LGERA 92.
- 71 Hon Justice N Pain, Hon Justice R Pepper, M McCreath & J Zorzetto, “Restorative Justice for Environmental Crime: An Antipodean Experience” (International Union for Conservation of Nature Academy of Environmental Law Colloquium 2016, Oslo Norway 22 June 2016) at 9.
- 72 For a discussion of the use of restorative justice for environmental crimes, see Preston, *supra* note 69. Restorative justice outcomes are also used in the Australian State of Victoria (with the main restorative justice provision, found in s 67AC(2)(c) of the *Environment Protection Act 1970* (Vic), inserted into the Act in 2000) and New Zealand (*Sentencing Act 2002* (NZ)). For a recent discussion of the restorative justice practices in these jurisdictions, see Pain et al, *ibid* at 12–16.
- 73 Preston, *supra* note 69 at 25.
- 74 For a detailed discussion of the possible victims of an environmental crime, including specific individuals, classes of persons, members of the community, future generations, and the environment other than humans, see Preston, *supra* note 69 at 8–12. See also Pain et al, *supra* note 71 at 6–8.
- 75 Preston, *supra* note 69 at 25.
- 76 Pain et al, *supra* note 71 at 16.
- 77 Pain et al, *ibid*.
- 78 Preston, *supra* note 69 at 23–25.